BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-110-WS - ORDER NO. 2006-262

JUNE 27, 2006

IN RE:	Petition of Office of Regulatory Staff to Request Forfeiture of the Piney Grove Utilities, Inc.'s Bond and to Request Authority to Petition the Circuit Court for Appointment of a Receiver.	) ORDER RULING ON) PETITION FOR) REHEARING AND/OR) RECONSIDERATION) AND APPLICATION FOR) REHEARING

This matter comes before the Public Service Commission of South Carolina ("Commission") by a Petition for Rehearing and/or Reconsideration from the Office of Regulatory Staff ("ORS") and an Application for Rehearing from Piney Grove Utilities ("Piney Grove" or "Respondent"). The parties request a rehearing of Docket Number 2005-110-WS pursuant to S.C. Code Ann. Section 58-5-330[1] and under the authority of Section 58-5-720,[2] concerning the open issue of forfeiting Piney Grove's performance

[1] S.C. Code Ann. § 58-5-330 states in relevant part: "If, after such hearing and a consideration of all the facts, including those arising since the making of the order or decision, the Commission shall be of the opinion that the original order or decision, or any part thereof, is in any respect unjust or unwarranted or should be changed, the Commission may abrogate, change or modify it and, if changed or modified, such modified order shall be substituted in the place of the order originally entered and with like force and effect."

[2] S.C. Code Ann. § 58-5-720 provides:

> The commission shall, before the granting of authority or consent to any water or sewer utility regulated by the commission, for the construction, operation, maintenance, acquisition, expansion, or improvement of any facility or system, prescribe as a condition to the consent or approval that the utility shall file with the commission a bond with sufficient surety, as approved by the commission, in an amount not less than one hundred thousand dollars and not more than three hundred fifty thousand dollars payable to the commission and conditioned upon the provision by the utility of adequate and sufficient

Continued...

bond as allowed in Order No. 2006-59.[3] This Order specifies that any duly appointed receiver, or other appropriate party, "may come back before the Commission and argue for forfeiture of the bond at a later date on the basis of itemized expenditures or losses."[4] According to Order No. 2001-761 in Docket Number 2000-588-W, this bond is held by the Piedmont Water Company ("Piedmont") and covers Piney Grove due to consolidation of the two companies. After review of the record and the merits of each party's arguments, the Petition from ORS is GRANTED, while the Application from Piney Grove is DENIED.

ORS' request for itemized forfeiture stems from the Commission's findings that Piney Grove failed to provide adequate and proper service to its customers as required by S.C. Code Ann. § 58-5-10 *et seq.*[5] Piney Grove's persistent failings include improper billing procedures, refusing to respond to customer complaints, disconnecting customers without notice, operating in a manner that causes strong sewer odors, improperly treating wastewater, and illegally releasing untreated wastewater into streets and storm drains.[6] As a result, the South Carolina Department of Health and Environmental Control ("DHEC") assumed control of Piney Grove's facilities until temporary receivers were

---

> service within its service area or deliver to the commission certificates of deposit, with endorsements as required by the commission, of federal or state chartered banks or savings and loan associations who maintain an office in this State and whose accounts are insured by either the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. The certificates of deposit shall not exceed the amount covered by insurance. The commission has the right, upon notice and hearing, to declare all or any part of the bond or certificate of deposit forfeited upon a determination by the commission that the utility failed to provide service without just cause or excuse and that this failure has continued for an unreasonable length of time.

[3] Order No. 2006-59 at 15 (paragraph 9) (Dated February 24, 2006).
[4] *Id.* at 15-16.
[5] *Id.* at 3.
[6] *Id.* at 4-8.

appointed by the Circuit Court.[7] ORS now seeks itemized forfeiture of the bond for the costs incurred by these entities while operating the facilities in the place of Piney Grove.[8]

Piney Grove challenges forfeiture of Piedmont's bond to cover its liability for receivership costs, first, on the basis that no consolidation with Piedmont occurred, and, next, on the basis that it is contrary to the express terms of Piedmont's bond, which requires a "[willful failure] to provide" adequate and sufficient service. Regarding the issue of consolidation, Piney Grove argues that Order No. 2001-761 required the meeting of certain criteria before consolidation was finalized, that these criteria were never met, and that, therefore, Piney Grove is not a party to the Piedmont Bond.[9] To advance this argument, it relies on *SCPSC v. Colonial Construction Company*, 274 S.C. 581, 266 S.E.2d 76 (1980), for the proposition that "[a] surety's obligation is contractual and cannot extend beyond the terms of the bond and the intent of the parties."[10] Based on this holding, it asserts the express terms of Piedmont's bond never included responsibility for the operation of Piney Grove.[11]

However, reliance on *Colonial Construction* to prevent application of Piedmont's bond is misplaced. In *Colonial Construction*, the South Carolina Supreme Court prevented total forfeiture of a sewer utility bond for improvements and expansion when the language of the bond and intent of the parties conditioned forfeiture on failing to

[7] ORS Petition for Rehearing at 3-4.
[8] *Id.* at 1-4, Attachment 1–3. However, in the Petition, ORS never states the specific amount it seeks for forfeiture. The total of $128,388.25 is calculated by adding the expenditures listed in the attachments. This amount is greater than the amount of the bond posted by Piedmont of $125,000 that covers Piney Grove's operation.
[9] Piney Grove Application for Rehearing at 2-3.
[10] *Id.* at 4.
[11] *Id.*

perform maintenance and service obligations.[12] The Court found that forfeiture based on improvements and expansion was outside the scope of language forfeiting the bond for failing to properly maintain the sewage treatment facility and provide service to its customers.[13]

In contrast, the present case concerns itemized forfeiture directly related to the purpose of the bond, not forfeiture for subject matter falling outside the language of the bond. The purpose of Piedmont's bond is "to cover any and all liability, which may arise as a result of the principal failing to provide adequate and sufficient service..."[14] Forfeiture of Piedmont's bond, applied to the liability of Piney Grove, results from the costs of control and receivership stemming from Piney Grove's persistently inadequate and insufficient service. Therefore, the fundamental issue in *Colonial Construction* is inapplicable to the case at hand. In fact, it sustains forfeiting the bond because the reasons for forfeiture fall squarely within the bond's terms.

Moreover, *Colonial Construction's* second premise that "[a] surety's obligation is contractual and cannot extend beyond... the intent of the parties" also fails to support Respondent's defense. Respondent makes the assertion that Piedmont's bond, executed on May 17, 2001, predated the August 20, 2001 Order Approving Consolidation and was never meant to include responsibility for the operation of Piney Grove.[15] However, according to *Colonial Construction's* guidance in determining the intent of a bond, when

[12] 274 S.C. at 582-584, 266 S.E.2d at 77.
[13] *See id.*
[14] Piedmont's Performance Bond at 1.
[15] Piney Grove Application for Rehearing at 4.

an agreement is incorporated into a bond so as to become a part of the bond, the two will be read together and construed as a whole to ascertain the intent of the parties.[16]

Piedmont's intent is clear in its application for consolidation, titled "Consolidation of Water Assets into Piedmont Water Company" in Docket No. 2000-588-W, that the bond applies to certain consolidated entities, including Piney Grove.[17] The application for consolidation states:

> *Consolidating will benefit the customers* in many obvious ways such as: low rates, consistent service, and spreading administrative costs. *Specifically* the recent legislative regulation, which raised the financial threshold of *bonding, will be demonstrated and available to small system customers.*[18]

(Emphasis added.) Reading the application for consolidation together with Piedmont's bond and construing them as a whole establishes Piedmont's clear intent to cover Piney Grove's liabilities. In this light, consolidating Piney Grove under Piedmont incorporated an agreement that modified the original intent of Piedmont's bond.[19] This modification is evident in the fact that Piedmont increased its original sewer bond from $100,000 before consolidation to $125,000 after consolidation to reflect its increased responsibility for the facilities placed under Piedmont's bond pursuant to the Commission's Order Approving Consolidation.[20]

---

[16] *Colonial Construction*, 274 S.C. at 585, 266 S.E.2d at 77.
[17] Piedmont's Application for Consolidation, titled "Consolidation of Water Assets into Piedmont Water Company" at paragraph 2 (dated December 7, 2000). This Application resulted in Order No. 2001-761 (dated August 20, 2001), which consolidated Eagle Point Water Company, Inc., **Piney Grove Utilities, Inc.**, and Tickton Hall Water Company into Piedmont Water Company, Inc.
[18] *Id.*
[19] Indeed, Reese Williams, President and primary shareholder of Piedmont, and a guarantor on the bond, testified in support of consolidation. Order No. 2001-761 at 2.
[20] *Id* at 5.

Despite the obvious intent to cover Piney Grove's liabilities with Piedmont's bond under the consolidation, Respondent now asserts the contrary position that since certain goals surrounding the consolidation were not met, no consolidation occurred, and the bond fails to apply.[21] The unfulfilled goals related to Piedmont and Piney Grove include the filing of annual reports with the Commission and compliance with DHEC's regulations. However, these goals are merely administrative in nature and in no way effect either the substantive operation of the companies or the substance of the consolidation. Additionally, as noted unambiguously in Order No. 2006-59, these commitments for consolidation were not preconditions but accompanying duties.[22] That the companies failed in some of their accompanying duties does not change the fact of consolidation.[23]

The Commission's discussion concerning its rejection of this argument in Commission Order No. 2006-59 will not be repeated here. Suffice it to say that the wastewater treatment facilities, as consolidated under Piedmont, enjoyed the benefits of that consolidation, including the benefit of forgoing the expense of placing individual bonds with the Commission. Since these entities took advantage of the benefits of the consolidation that they sought and were granted, neither Piedmont nor Piney Grove can

[21] Piney Grove Application for Rehearing at 2-3.
[22] Order No. 2006-59 at 12-14 (paragraph 7) (dated February 24, 2006).
[23] With the exception of the increase in the bond amount, all those accompanying duties were ongoing and pre-existing well before the Commission's issuance of its consolidation order – i.e., they were duties which South Carolina laws and regulations had already placed on the companies. They were listed by the Commission "in consideration of [the Commission's] approval of the consolidation" [Order No. 2001-761 at 4], out of concerns that it had regarding the companies' pre-existing non-compliance, not as pre-conditions to consolidation. The one new duty placed on the companies in that order was to increase the bond amount from $100,000 to $125,000 in order to meet the increased need for protection in case the companies continued to fail in their other listed duties. As noted above, the companies fulfilled that critical duty and increased the bond amount to $125,000.

now come back and argue the incompatible position that the consolidation never occurred, and therefore the bond does not apply. Furthermore, even if these accompanying duties were viewed as preconditions, Piney Grove cannot benefit from its own failure to carry out commitments it made in the consolidation proceeding. Consequently, Piney Grove cannot legitimately assert this later inconsistent argument.

As a final matter, Piney Grove argues that the express language of the bond requires the Commission to determine that Piedmont "willfully failed to provide" adequate and sufficient service "without just cause and excuse, and that such failure has continued for an unreasonable length of time." It asserts the bond cannot be forfeited because the Commission's directive of November 8, 2005 never made a finding of willfulness.[24] This assertion, however, is inaccurate. The directive states that an appropriate party may "come back before the Commission and argue for forfeiture on the basis of itemized expenditures," implicitly making a finding of willfulness. This finding is evident, as Piney Grove points out, because willfulness is a precondition to forfeiture in Piedmont's bond. Furthermore, Order No. 2006-59 resolves the matter to an even higher degree of clarity.[25]

Order No. 2006-59 plainly states, in the clearest terms possible, that Piney Grove's failure was willful.[26] In paragraph 6 on page 11, the Order states "Piney Grove's

[24] Piney Grove Application for Rehearing at 4-5.
[25] According to 26 S.C. Code Ann. Regs. 103-804(T) (1976), an order is dispositive. Regulation 103-804 states an order is a "written decision or opinion issued by the Commission representing the whole or any part of the disposition... of a formal proceeding before the Commission."
[26] Order No. 2006-59 at 11-12 (paragraph 6). *See also, Id.* at 5, 7-8, 10-12, where the Commission further characterizes the evidence concerning Piney Grove's willful and habitual conduct and unreasonable delay (*e.g.*, "consistently and unreasonably delays in responding or willfully fails to respond" (page 5), "unreasonably delayed or failed" (page 7), "consistently failed" (page 7), "unreasonable and continuing lack of maintenance" (page 7), "maintenance deficiencies continued for so long that DHEC had to use state

failure to provide adequate and proper service has been willful and has continued for an unreasonable length of time." This Order further noted that "by continuing to operate its facilities and conduct its billing in violation of this Commission's regulation after notification of the unlawfulness, Piney Grove has demonstrated that it specifically intended not to comply with the directives and requirements of this Commission. The Commission finds such misconduct to be willful and without excuse."[27] Clearly, a finding of willfulness has been made that amply comports with the language of Piedmont's bond and allows for the forfeiture of this bond.

In conclusion, this Commission holds that a rehearing will now be scheduled to accept evidence of itemized expenditures regarding forfeiture of Piedmont's bond due to the inadequate and insufficient service of Piney Grove. Therefore, ORS' Petition for Rehearing and/or Reconsideration is GRANTED, while the arguments in Piney Grove's Application for Rehearing are rejected, and the Petition is DENIED.

money to employ an operator to minimize the amount of contaminants being discharged" (page 8), "has knowingly and willfully continued to charge . . ., even after the Office of Regulatory Staff notified the Company that these charges were improper" (page 10), "willful refusal to be accountable for problems in its system and its unreasonable delay or complete failure to respond" (page 10), "knowingly and willfully continued" (page 10), and "habitually disregarded the authority of both DHEC and this Commission" (page 11).)

[27] *Id.* at 12 (paragraph 6).

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice Chairman

(SEAL)